IN THE

Supreme Court of the United States

SEP 24 1952

October Term, 1952
No. 254

CARL E. BROWN and PAUL C. BROWN, a co-partnership, and CALIFORNIA COMPENSATION INSURANCE COMPANY,

Petitioners,

vs.

THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, LIPSMAN-FULKERSON & Co., a corporation, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, a corporation, and PAUL C. BROWN,

Respondents.

Petition for Writ of Certiorari, Brief in Support Thereof and Motion for Leave to Proceed on One Certified Record.

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IN THE

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No. .....

CARL E. BROWN and PAUL C. BROWN, a co-partnership, and CALIFORNIA COMPENSATION INSURANCE COMPANY,

Petitioners,

vs.

THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, LIPSMAN-FULKERSON & CO., a corporation, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, a corporation, and PAUL C. BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Carl E. Brown and Paul C. Brown, a co-partnership, and California Compensation Insurance Company respectfully petition the Honorable Court for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Three, and as grounds therefor set forth as follows:

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257(3) U. S. Code, and by Rule 38 of the Revised Rules of the Supreme Court of the United States. The minute order denying your petitioners' application for review of the decision of respondent Commission was entered by said District Court of Appeal on May 5, 1952. A petition for rehearing was filed in said District Court of Appeal by your petitioners within the time fixed by law specially setting up and claiming that said minute order of May 5, 1952, deprived your petitioners of property without due process of law and denied your petitioners equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. Said petition for rehearing was denied by minute order May 29, 1952. A petition for hearing was filed in the Supreme Court of the State of California within the time fixed by law and upon the grounds that the aforesaid minute orders of the District Court of Appeal of May 5, 1952, and of May 29, 1952, deprived your petitioners of property without due process of law and denied your petitioners equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. Said petition for hearing was denied by minute order June 26, 1952. Petition to this Court is being filed within the ninety days fixed by Title 28, Section 2101(p), U. S. Codes.

Statutes Involved.

Section 1 of the Fourteenth Amendment to the Constitution of the United States; Article I, Section 22, Article VI, Section 24, and Article XX, Section 21, of the Constitution of California, and Sections 5952 and 5955 of the Labor Code of California are set forth in Appendix "A" hereof.

Opinions Below.

There are no opinions below. One of the grounds upon which your petitioners contend that due process of law and equal protection of the laws has been denied them, contrary to the Fourteenth Amendment to the Constitution of the United States rests upon the fact that this case was decided without any statement or opinion disclosing the grounds of the decision, notwithstanding the mandatory requirement of written opinions contained in Article VI, Section 24 of the Constitution of California, and the uniform practice of the California appellate courts to write opinions in cases other than those denying review of decisions of respondent Commission.

Summary Statement of the Facts involved in This Case.

Your petitioners regularly applied to the District Court of Appeal for review of a decision of respondent Industrial Accident Commission by which your petitioners were held liable, jointly and severally with respondent Lipsman-Fulkerson & Co., for many thousands of dollars of compensation benefits to which respondent Paul C. Brown is entitled. Paul C. Brown's right to these benefits has not been questioned by your petitioners. But your petitioners showed, by their petition to said District Court of Appeal seven separate grounds upon all, or any one of which, your petitioners should have been relieved of liability, as a matter of law, and all of said liability should have been assessed against either respondent American Mutual Liability Insurance Company or, in the alternative, against respondent Lipsman-Fulkerson & Co. The facts and points of law relied upon in said petition for writ of review are more fully set forth in Appendix "B" hereof,

and said petition is a part of the record herein. [R. 1-83.]

The District Court of Appeal summarily denied said petition, by minute order dated May 5, 1952. [R. 190.] The effect of said minute order was to affirm the decision of respondent Commission without any review of the record below (said record of respondent Commission never having been before the appellate courts at any stage of the proceedings below), without any hearing before said District Court of Appeal, and without any decision in writing or opinion stating the grounds of the decision. Eighty per cent of petitions filed for review of the decisions of respondent Commission are denied in this summary manner.

Your petitioners thereupon timely filed in said District Court of Appeal their petition for rehearing upon the grounds that under the Fourteenth Amendment to the Constitution of the United States, your petitioners were entitled to have due process of law under the laws of California, and to enjoy equal protection of the laws of California, and that (a) Article XX, Section 21 of the State Constitution, and Section 5952 of the Labor Code of California as amended in 1951 required that the decision of the District Court of Appeal must be based upon review of the entire record to be certified by respondent Commission. [R. 197, 198.] (b) Article VI, Section 24, of the State Constitution required the decision of the District Court of Appeal to be given in writing, and the grounds of the decision to be stated. [R. 193-196.] (c) That the affirmance of the decision below by said District Court of Appeal without review of the record below, without any hearing, and without any opinion stating the grounds of its decision denied your peti-

tioners due process of law and the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. [R. 200-205.]

Said petition for rehearing was summarily denied, by minute order, without any hearing, and without opinion. [R. 221.]

Your petitioners thereupon timely filed in the Supreme Court of the State of California, a petition for hearing upon each and all of the aforesaid grounds including the claim of denial of rights under the Fourteenth Amendment to the Constitution of the United States. [R. 222-236.]

Said petition for hearing was summarily and arbitrarily denied on June 26, 1952, by minute order, without any hearing, and without opinion. [R. 321.]

Questions Presented by This Petition.

1. Whether, in a State where the State Constitution and Statutes enacted thereunder guarantee the right of a person aggrieved by a decision of the State Industrial Accident Commission to have such decision reviewed by the District Court of Appeal or the State Supreme Court, a summary denial of such review by such courts, without reviewing the record below, without hearing, and without opinion, affords the aggrieved person due process of law in compliance with Amendment Fourteen to the Constitution of the United States.

2. Whether, in a State where the State Constitution makes mandatory that the decision of all causes before the District Court of Appeal and the State Supreme Court shall be given in writing, and shall state the grounds

of the decision, a mere minute order of such courts, denying without opinion review of a decision of the State Industrial Accident Commission affords the person aggrieved by such decision due process of law in compliance with Amendment Fourteen to the Constitution of the United States.

3. Whether, in a State where the District Court of Appeal makes decisions affirming the final decisions of other lower courts only by written opinion, after review of the record below, and hearing. persons aggrieved by decisions of the State Industrial Accident Commission are accorded equal protection of the laws in compliance with Amendment Fourteen to the Constitution of the United States by the practice of said District Court of Appeal summarily to deny eighty percent of petitions to review such Commission decisions, the effect being to affirm the same without review of the record below, without hearing, and without opinion.

4. Whether, in a State where the District Court of Appeal never reverses a decision of the State Industrial Accident Commission except by written opinion, after a review of the record below, and after a hearing, persons aggrieved by decisions of the Industrial Accident Commission are accorded equal protection of the laws in compliance with Amendment Fourteen to the Constitution of the United States by the practice of said District Court of Appeal to summarily deny eighty percent of petitions to review such Commission decisions, thereby affirming the same without review of the record below, without hearing, and without opinion.

5. Whether the courts below in arbitrarily denying a hearing have acted arbitrarily and capriciously in viola-

tion of the 14th Amendment to the United States Constitution.

6. Whether Section 5952, Deering's Labor Code of the State of California, providing "that the review by a court shall not extend further than to *determine*" certain questions without providing for a notice and a hearing and oral argument upon such determination is, inherently and as construed and applied in this case, unconstitutional and in violation of both the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

7. Whether your petitioners, without any hearing in the Appellate or Supreme Court of the State of California (no hearing being provided for in any court of record) could be held liable to one who was not in their employment when injured and was not on the payroll of respondent, Lipsman-Fulkerson & Co., whose liability was insured by respondent American Mutual Liability Insurance Company.

Reasons for Granting This Writ.

1. The case raises important and substantial questions concerning the denial to millions of workmen, their employer, and insurance carriers, of due process of law and of equal protection of the laws guaranteed them by Amendment Fourteen to the Constitution of the United States.

2. The case involves an important question, fundamental to constitutional government, whether the highest appellate courts of a state may, without denying due process of law and equal protection of the laws under Amendment Fourteen to the Constitution of the United

States, decline to perform duties imposed upon them by the State Constitution and statutes, and vitally affecting the property rights of millions of workmen, their employers and insurers, who are subject to the workmen's compensation laws of the state.

3. The case involves the decision by a state court of federal questions not heretofore determined by this court, and in a way probably not in accord with applicable decisions of this court.

Wherefore, petitioner prays for a writ of certiorari and reversal of the decision of said District Court of Appeal, and for such other relief as may be appropriate.

Respectfully submitted,

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Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257(3) U. S. Code, and by Rule 38 of the Revised Rules of the Supreme Court of the United States. The minute order denying your petitioners' application for review of the decision of respondent Commission was entered by said District Court of Appeal on May 5, 1952. A petition for rehearing was filed in said District Court of Appeal by your petitioners within the time fixed by law specially setting up and claiming that said minute order of May 5, 1952, deprived your petitioners of property without due process of law and denied your petitioners equal protec-

tion of the laws under the Fourteenth Amendment to the Constitution of the United States. Said petition for rehearing was denied by minute order May 29, 1952. A petition for hearing was filed in the Supreme Court of the State of California within the time fixed by law and upon the grounds that the aforesaid minute orders of the District Court of Appeal of May 5, 1952, and of May 29, 1952, deprived your petitioners of property without due process of law and denied your petitioners' equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. Said petition for hearing was denied by minute order June 26, 1952. Petition to this Court is being filed within the ninety days fixed by Title 28, Section 2101(p), U. S. Codes.

Opinions Below.

There were no opinions below.

Summary Statement of the Facts Involved in This Case.

Your petitioners regularly applied to the District Court of Appeal for review of a decision of respondent Industrial Accident Commission by which your petitioners were held liable, jointly and severally with respondent Lipsman-Fulkerson & Co., for many thousands of dollars of compensation benefits to which respondent Paul C. Brown is entitled. Paul C. Brown's right to these benefits has not been questioned by your petitioners. But your petitioners showed, by their petition to said District Court of Appeal seven separate grounds upon all, or any one of which,

your petitioners should have been relieved of liability, as a matter of law, and all of said liability should have been assessed against either respondent American Mutual Liability Insurance Company or, in the alternative, against respondent Lipsman-Fulkerson & Co. The facts and points of law relied upon in said petition for Writ of Review are more fully set forth in Appendix "B" hereof, and said petition is a part of the record herein. [R. 1-83.]

The District Court of Appeal summarily denied said petition, by minute order dated May 5, 1952. [R. 190.] The effect of said minute order was to affirm the decision of respondent Commission without any review of the record below (said record of respondent Commission never having been before the appellate courts at any stage of the proceedings below), without any hearing before said District Court of Appeal, and without any decision in writing or opinion stating the grounds of the decision. Eighty percent of petitions filed for review of the decisions of respondent Commission are denied in this summary manner.

Your petitioners thereupon timely filed in said District Court of Appeal their petition for rehearing upon the grounds that under the Fourteenth Amendment to the Constitution of the United States, your petitioners were entitled to have due process of law under the laws of California, and to enjoy equal protection of the laws of California, and that (a) Article XX, Section 21 of the State Constitution, and Section 5952 of the Labor

Code of California as amended in 1951 required that the decision of the District Court of Appeal must be based upon review of the entire record to be certified by respondent Commission. [R. 197, 198.] (b) Article VI, Section 24, of the State Constitution required the decision of the District Court of Appeal to be given in writing, and the grounds of the decision to be stated. [R. 193-196.] (c) That the affirmance of the decision below by said District Court of Appeal without review of the record below, without any hearing, and without any opinion stating the grounds of its decision denied your petitioners due process of law and the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Consttiution of the United States. [R. 200-205.]

Said petition for rehearing was summarily denied, by minute order, without any hearing, and without opinion. [R. 221.]

Your petitioners thereupon timely filed in the Supreme Court of the State of California, a petition for hearing upon each and all of the aforesaid grounds including the claim of denial of rights under the Fourteenth Amendment to the Constitution of the United States. [R. 222-236.]

Said Petition for hearing was summarily and arbitrarily denied on June 26, 1952, by minute order, without any hearing, and without opinion. [R. 321.]

Statutes Involved.

Section 1 of the Fourteenth Amendment to the Constitution of the United States, Article I, Section 22, Article VI, Section 24, and Article XX, Section 21, of the Constitution of California, and Sections 5952 and 5955 of the Labor Code of California are set forth in Appendix "A" hereof.

Specification of Errors.

1. The District Court of Appeal erred in that its order denying review of the decision of respondent Commission deprived petitioners of property without due process of law in contravention of Amendment Fourteen to the Constitution of the United States.

2. The District Court of Appeal erred in that its decision of the cause below by minute order and not by a decision in writing, stating the grounds of the decision, deprived your petitioners of property without due process of law in contravention of Amendment Fourteen to the Constitution of the United States.

3. The District Court of Appeal erred in that its decision affirming the decision of respondent Commission without review of the Commission's record, without a hearing, and without a decision in writing, stating the grounds of the decision, denied your petitioners the equal protection of the laws in contravention of Amendment Fourteen to the Constitution of the United States.

4. The District Court of Appeal erred in construing Section 5952 of the Labor Code of the State of California

as authorizing a determination of questions under it without providing for notice and a hearing and oral argument, and in holding that such procedure, inherently and as construed and applied, does not violate the due process clause and the equal protections clause of the Fourteenth Amendment to the Constitution of the United States.

5. The District Court of Appeal erred in holding that the petitioner was not aggrieved by the decision of the District Court of Appeal which in this case and in 80% of the cases summarily denies reviews where they are in favor of the Industrial Accident Commission but grants hearings where they are against the Industrial Accident Commission, and erred in holding such procedure does not deny due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

6. The District Court of Appeal erred in holding petitioner liable to one not in his employ when injured and not on his payroll, and one who was insured by respondent American Mutual Liability Insurance Company, without a hearing in the Appellate or Supreme Court of the State of California, no hearing being provided for in any lower court of record below the appellate Court.

Summary of Argument.

1. Where the State Constitution and statutes enacted thereunder guarantee the right of a person aggrieved by a decision of the State Industrial Accident Commission to have such decision reviewed upon the entire record of the Commission, by the District Court of Appeal or the State Supreme Court, such review is an integral part of the due process of law prescribed by the State, and a summary denial of such review by such court, without reviewing the record below, without hearing, and without opinion, denies the aggrieved person due process of law, contrary to the provisions of Amendment Fourteen to the Constitution of the United States.

2. Where the State Constitution makes mandatory that the decision of all causes before the District Court of Appeal and the Supreme Court of the State shall be given in writing, and shall state the grounds of the decision, a mere minute order of said Courts, denying without opinion, review of a decision of the State Industrial Accident Commission denies the person aggrieved by such decision due process of law, contrary to the provisions of Amendment Fourteen to the Constitution of the United States.

3. Where the District Court of Appeal of a state makes decisions affirming the decisions of other lower courts only by written opinion, after review of the record below, and a hearing, persons aggrieved by decisions of the State Industrial Accident Commission are denied the equal protection of the laws, guaranteed them by Amendment Fourteen to the Constitution of the United States, by a practice of said District Court of Appeal to summarily deny

eighty per cent of petitions to review such Commission decisions, the effect being to affirm the same without review of the record below, without hearing, and without opinion.

4. Where the District Court of Appeal of a state never reverses a decision of the State Industrial Accident Commission except by written opinion, after review of the record below, and after a hearing, persons aggrieved by decisions of the Industrial Accident Commission are denied the equal protection of the laws, guaranteed them by the Fourteenth Amendment to the Constitution of the United States, by a practice of said District Court of Appeal to summarily deny eighty per cent of petitions to review such Commission decisions, the effect being to affirm the same without review of the record below, without hearing, and without opinion.

5. Section 5952, Deering's Labor Code of the State of California, providing "That the review by a court shall not extend further than to determine certain questions" without providing for a notice and a hearing and oral argument upon such determination is, inherently and as construed and applied in this case, unconstitutional and in violation of both the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

6. Whether your petitioners, without any hearing in the Appellate or Supreme Court of the State of California (no hearing being provided for in any lower court of record) could be held liable to one who was not in their employment when injured and was not on the payroll of respondent, Lipsman-Fulkerson & Co., whose liability was insured by respondent American Mutual Liability Insurance Company.

ARGUMENT.

I.

The Order of the District Court of Appeal Denying Review of the Decision of Respondent Commission Deprived Your Petitioners of Property Without Due Process of Law, Contrary to the Provisions of Amendment Fourteen to the Constitution of the United States.

The entire system of Workmen's Compensation in California is derived from and dependent upon the provisions of Article XX, Section 21, of the Constitution of the State of California. (*Western Indemnity Co. v. Pillsbury,* 170 Cal. 686, 151 Pac. 398.) The authority of the Legislature to create respondent Industrial Accident Commission and to confer upon it jurisdiction to hear and decide causes is likewise derived from, dependent upon, and delimited by Article XX, Section 21, of the State Constitution. (*Western Metal Supply Co. v. Pillsbury,* 172 Cal. 407, 156 Pac. 491; *Pacific Coast Cas. Co. v. Pillsbury,* 171 Cal. 319, 153 Pac. 24.)

The material portion of Article XX, Section 21, of the Constitution of the State of California, provides as follows:

> "The Legislature is vested with plenary powers, to provide for the settlement of any dispute arising under such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided that *all* decisions of any such tribunal shall be subject to review by the appellate courts of this State." (Emphasis added.)

Article I, Section 22, of the Constitution of California, provides that:

> "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

The foregoing applies to all sections of the Constitution alike, and binds all departments of the State government, legislative, executive, and judicial. (*People v. City of Buenaventura,* 213 Cal. 637, 3 P. 2d 3; *People v. California Fish Co.,* 166 Cal. 576, 138 Pac. 79; *Oakland Paving Co. v. Hilton,* 69 Cal. 479, 11 Pac. 3.)

Thus, the Legislature could not have provided that none of the decisions of respondent Commission should be subject to review in the appellate courts of California. Nor could it have provided that only one-fifth of such decisions should be subject to such review. And yet, during the four and one-half year period ending June 30, 1952, four-fifths of the applications made to the appellate courts for such review met with the same summary denial which was accorded in this case.

Moreover, the foregoing provision of the State Constitution expressly includes the review of decisions of respondent Commission within the appellate jurisdiction of the California appellate courts, and thereby confers upon persons aggrieved by decisions of the respondent Commission an absolute right to appellate review. (*In re Sutter-Butte By-Pass Assessment No. 6,* 190 Cal. 532, 213 Pac. 974.) This right is guaranteed, and can-

not be diminished or destroyed by any change in statutory remedy. (*Idem.*)

Acting under the authority of Article XX, Section 21, of the California Constitution, the Legislature in 1951 amended Section 5952 of the Labor Code of California to require the review of decisions of respondent Commission to be "based on the entire record which shall be certified by the commission."

The appellate review of decisions of respondent Commission guaranteed by the State Constitution, and the requirement that such review be based on the entire record of respondent Commission are integral parts of due process of law in California. (*Cole v. State of Arkansas,* 333 U. S. 196-202, 92 L. Ed. 644-648, citing *Frank v. Mangum,* 237 U. S. 309, 327, 59 L. Ed. 969, 980.) The failure or refusal of a state court to afford a party litigant due process of law according to the law of the forum is a denial of due process of law violating the guarantee of the Fourteenth Amendment to the Constitution of the United States. (*Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673-682, 74 L. Ed. 1107-1114; *Postal Telegraph & Cable Co. v. Newport,* 247 U. S. 464, 62 L. Ed. 1215; *Laisne v. State Board of Optometry,* 19 Cal. 2d 831, 123 P. 2d 457.) Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States may be denied by judicial inaction (*Dowd v. United States,* 340 U. S. 206, 95 L. Ed. 215), as well as by judicial action. (*Shelley v. Kraemer,* 334 U. S. 1, 92 L. Ed. 1161.)

II.

The Minute Order of the District Court of Appeal Deciding the Case Without a Decision in Writing, and Without Stating the Grounds of Its Decision, Denies Your Petitioners Due Process of Law, Contrary to the Provisions of Amendment Fourteen to the Constitution of the United States.

The material portion of Article VI, Section 24, of the State of California provides as follows:

> "In the determination of causes all decisions of the Supreme Court and of the district courts of appeal shall be given in writing, and the grounds of the decision shall be stated."

This provision of the State Constitution is mandatory. (*Article I, Section 22 of the Constitution of the State of California*; *People v. City of Buenaventura,* 213 Cal. 637, 3 P. 2d 3; *People v. California Fish Co.,* 166 Cal. 576, 138 Pac. 79; *Oakland Paving Co. v. Hilton,* 69 Cal. 479, 11 Pac. 3.)

An order denying a writ of review against respondent Industrial Accident Commission is the "determination of a cause" and is a "decision" within the meaning of the foregoing constitutional provision. (*Madera Sugar Pine Co. v. Ind. Acc. Comm. of Calif.,* 262 U. S. 499, 43 S. Ct. 604, 67 L. Ed. 1091; *Napa Valley Electric Co. v. Railroad Commission,* 251 U. S. 366, 40 S. Ct. 174, 61 L. Ed. 310.)

The requirement that the decisions of the District Court of Appeal state in writing their reasons, and fully and fairly state the case as to the controlling facts and the pertinent rules of law involves a right of the litigants which is so substantial, and so vitally affects the right to petition the State Supreme Court for a hearing, that memorandum decisions are not permissible, even in disposing of an appeal which is considered frivolous. (*Vickers v. Pan-Pacific Sales Corp.*, 108 A. C. A. 708, 239 P. 2d 463.) The requirement is an integral part of due process of law in California. (*Cole v. State of Arkansas*, 333 U. S. 196, 92 L. Ed. 644; *Frank v. Mangum*, 237 U. S. 309, 59 L. Ed. 969.)

The decision of petitioners' case by the District Court of Appeal by minute order, with no opinion whatever, was a denial of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. Ed. 1107; *Postal Telegraph &Cable Co. v. Newport*, 247 U. S. 464, 62 L. Ed. 1215; *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158; *Smith v. O'Grady*, 312 U. S. 329; *Dowd v. United States*, 340 U. S. 206, 95 L. Ed. 215; *Laisne v. State Board of Optometry*, 19 Cal. 2d 831, 123 P. 2d 457.)

III.

The Summary Denial of Review of the Decision of Respondent Commission Was Equivalent to Affirmance of That Decision Without Review of the Record, Without Hearing, and Without Opinion, and Denied Your Petitioners Equal Protection of the Laws, Contrary to the Provision of Amendment Fourteen to the Constitution of the United States.

Where review of Commission decisions is available only by writ of review, an order denying such review is in effect affirmance of the Commission decision. (*Wallace Ranch Water Co. v. Railroad Commission of Cal.*, 47 F. 2d 8.)

With the exception of Workmen's Compensation cases, any litigation in California having all the fundamental characteristics of an action at law or a suit in equity, includes the absolute right of appeal to the District Court of Appeal or the Supreme Court, and to have the judgment of the trial court reviewed by a review of the record, a hearing before the Appellate Court, with notice to counsel, oral and written argument, and decision by written opinion, and this regardless of the form of trial provided. (*In re Sutter-Butte By-Pass Assessment No. 6*, 190 Cal. 532, 213 Pac. 974.) In all such cases, the judgment of the trial court is reviewed on the record of the trial court. The parties are afforded an opportunity to be heard in the Appellate Court, and the decision is affirmed or reversed, or modified only by written opinion. But in eighty percent of the cases in which review of an Industrial Accident Commission decision is sought, the decision of the Appellate Court is affirmance by summary denial of the review.

In all appeals, even where the Appellate Court finds the appeal to be frivolous, the Appellate Court complies with the mandate of the State Constitution, by writing an opinion. (*Vickers v. Pan-Pacific Sales Corp.*, 108 A. C. A. 708, 239 P. 2d 463.)

Moreover, no decision of the respondent Commission is ever *reversed* by the District Court of Appeal except by the same essential steps as are taken in cases coming to the Court on appeal, viz., a review by the Court of the record below, followed by an opportunity to the parties to be heard, and a decision in writing with an opinion fully discussing the case and setting forth the reasons for the decision.

In view of the fact that eighty percent of applications made to the District Court of Appeal for review of Industrial Accident Commission decisions result in affirmance of such decisions by summary minute orders denying review, it becomes apparent that a serious discrimination is made by the District Courts of Appeal against persons aggrieved by decisions of respondent Commission.

Although Article XX, Section 21, of the State Constitution provides that *all* decisions of respondent Commission shall be subject to review by the Appellate Courts, it becomes apparent that in practice the law is administered so that only about one-fifth of the Commission's decisions in which review is sought are actually subject to review. Discrimination in affording the right of appeal is a denial by the courts of equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. (*Dowd v. United States*, 340 U. S. 206, 95 L. Ed. 215.) Just as discrimination based on race, in the administration of justice,

denies equal protection of the laws (*Carter v. Texas,* 177 U. S. 422, 44 L. Ed. 839; *Roger v. Alabama,* 192 U. S. 226, 48 L. Ed. 417; *Norris v. Alabama,* 294 U. S. 587, 79 L. Ed. 1074; *Shelley v. Kraemer,* 334 U. S. 1, 92 L. Ed. 1161), so does discriminatory denial of a remedy to working men and others who are subject to the jurisdiction of respondent Commission. (*Bogni v. Perotti,* 224 Mass. 152, 112 N. E. 853.)

IV.

Section 5952, Deering's Labor Code of the State of California Providing "That the Review by a Court Shall Not Extend Further Than to Determine Certain Questions" Without Providing for a Notice and a Hearing and Oral Argument Upon Such Determination Is, Inherently and as Construed and Applied in This Case, Unconstitutional and in Violation of Both the Due Process Clause and the Equal Protections Clause of the Fourteenth Amendment to the Constitution of the United States.

Although the Constitutional and Statutory provision in the State of California permits a review in the District Court of Appeal of the State of California the statute has merely used the word "determine" and has made no provision for a *hearing* in its true sense in a court of record after decision by the Industrial Accident Commission.

Before the State may act through its courts, the court must *hear.* It must hear before it condemns or takes property. Notice and hearing are the first essentials of

due process.[1] (*Powell v. Alabama,* 287 U. S. 45; *Wilson v. Standfer,* 184 U. S. 399, 46 Fed. 612; *Mississippi Pub. Co. v. Jackson,* 9 Fed. Supp. 564; *American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231.)

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant as a minimum requirement. (*Railroad Comm. v. Pacific Gas & Elec. Co.,* 302 U. S. 388, 82 L. Ed. 319.)

The due process clause of the Fourteenth Amendment requires that every person shall have the protection of his day in court and an opportunity to be heard, as an essential to due process. (*Hamrick v. Bryan,* 21 Fed. Supp. 392, 106 F. 2d 245; *Inter-Chemical Corp. v. Mirabelle,* 269 App. Div. 244, 54 N. Y. S. 2d 522; *Western Life Indemnity Co. v. Rupp.* 235 U. S. 261; *Hansberry v.*

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[1]"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy,* 169 U. S. 366, 389, 42 L. Ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page,* 18 Wall. 350, 368, 369, 21 L. Ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

Lee, 311 U. S. 32, 40-41; *Union Indemnity Co. v. Saling,* 166 Okla. 133, 26 P. 2d 217.)

Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination. (*Republic Pictures Corp. v. Kappler,* 151 F. 2d 543.) Where a statute denies a hearing in its true sense and permits the courts to determine an issue without notice or hearing, or without even the entire record before it, such a statute offends due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A hearing required by due process refers to a hearing on the truth of the allegations on questions of law as well as the facts.

> *Goodwill Station v. Federal Communications Commission,* 174 F. 2d 226, 239.

A hearing contemplates notice to the party and an opportunity to present argument and authorities.

> *United States v. Dillman,* 146 F. 2d 572, 574;
>
> *Colonial Trust Co. v. Austin,* 54 Atl. 503, 504;
>
> *Juster Bros. v. Christ Gau,* 7 N. W. 2d 501, 508.

A common-law hearing, among other things, requires an opportunity to be heard by counsel.

> *Wisconsin Telephone Co. v. Public Service Commission,* 287 N. W. 122, 133-143.

Of what avail is it to have counsel, as required by due process of law under *Powell v. Alabama,* 77 L. Ed. 158, without an opportunity to be heard in oral argument by the court? The denial of such a hearing is in effect denial of effective aid of counsel guaranteed under

the Fourteenth Amendment to the Constitution of the United States.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

In *Powell v. Alabama* the court asks, "What, then, does a hearing include?", then points out that a hearing includes the right to the aid of counsel. But if counsel are not permitted to be heard in the court of record, there is no hearing in its true sense. A summary action by the court is a denial of such a hearing guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The question is very vital as it affects thousands of workmen in the State of California and all others who come within the jurisdiction of the Workmen's Compensation Act.

V.

Whether Your Petitioners, Without Any Hearing in the Appellate or Supreme Court of the State of California (No Hearing Being Provided for in Any Lower Court) Could Be Held Liable to One Who Was Not in Their Employment When Injured and Was [redacted] on the Payroll of Respondent, Lipsman-Fulkerson & Co., Whose Liability Was Insured by Respondent American Mutual Liability Insurance Company.

The application of the statute, depriving the appellant of his constitutional right to be heard on the question of his liability and determination of the questions without review of a court of record under notice and full hearing, constituted a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

No cases have been found wherein this court has been asked to pass upon the questions presented here which arise out of the consistent refusal of California state courts of appeal, with reference to a large and important class of litigants, to perform duties enjoined by the organic law of the state as a part of its due process. The apparent novelty of the problem does not diminish its importance, but merely makes it necessary to reason the matter by analogy, rather than by reference to identical decided cases.

Your petitioners respectfully pray for certiorari and for reversal of the judgment of the District Court of Appeal.

Respectfully submitted,

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Attorneys for Petitioners.

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Of Counsel.

APPENDIX "A."

Statutes Involved.

Fourteenth Amendment to the Constitution of the United States, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of California, Article I, Section 22, as follows:

> *"Constitution Mandatory*
>
> Sec. 22. The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."
>
> *Constitution of California, Annotated,* Mason, p. 53.

Constitution of California, Article VI, Section 24, as follows:

> *"Salary of Judge Not to Be Paid, When—Written Opinions*
>
> Sec. 24. No justice of the Supreme Court nor of a district court of appeal, nor any judge of the superior court nor of a municipal court shall draw or receive any monthly salary unless he shall make and subscribe an affidavit before an officer entitled to ad-

minister oaths, that no cause in his court remains pending and undetermined that has been submitted for decision for a period of 90 days. In the determination of causes all decisions of the Supreme Court and of the district courts of appeal shall be given in writing, and the grounds of the decision shall be stated."

Constitution of California, Annotated, Mason, p. 90.

Constitution of California, Article XX, Section 21, as follows:

"Workmen's Compensation—Labor Disputes

Sec. 21. The Legislature is hereby expressly vested with plenary power unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish

compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State Compensation Insurance Fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workmen's compensation, as herein defined.

Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the Industrial Accident Commission of this State or the State Compensation Insurance Fund, the creation and existence of which, with all the functions vested in them, are hereby rati-

fied and confirmed. (*Amendment adopted November 5, 1918.*)

Constitution of California, Annotated, Mason, pp. 162, 163.

California Labor Code, Section 5952, as follows:

"5952. [67(b), amended 1951] The review by the court shall not be extended further than to determine, based on the entire record which shall be certified by the commission, whether:

(a) The commission acted without or in excess of its powers.

(b) The order, decision, or award was procured by fraud.

(c) The order, decision, or award was unreasonable.

(d) The order, decision, or award was not supported by substantial evidence.

(e) If findings of fact are made, such findings of fact support the order, decision, or award under review."

Deering's Labor Code of the State of California, 1951 Pocket Supplement, p. 104.

California Labor Code, Section 5955, as follows:

"5955. [67(d)] No court of this State, except the supreme court and the district courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the commission in the performance of its duties but a writ of mandate shall lie from the supreme court or the district courts of appeal in all proper cases."

Deering's Code of the State of California, p. 265.

APPENDIX "B."

The Case Below.

Briefly stated, the essential facts of the case in chief are as follows: Lipsman-Fulkerson & Co., were produce dealers in Omaha, Nebraska; one Deckard, a salaried agent of American Mutual Liability Insurance Company, called on officers of the produce company and solicited the produce company's workmen's compensation insurance business, representing that American Mutual would see that all of the produce company's needs in that connection were fully covered. American Mutual issued a policy of Workmen's Compensation Insurance which, by its terms provided coverage for injuries occurring to employees of the produce company anywhere in the United States as follows: First, against liability under the workmen's compensation law of Nebraska, and second, against liability for damages. As issued, the policy did not insure the produce company as to such injuries against liability arising under the workmen's compensation law of California, or of numerous states other than Nebraska. Deckard, the American Mutual representative called upon the produce company at intervals of approximately six weeks and assisted them with other insurance problems, even assisting them in obtaining from another company a type of insurance not written by American Mutual, viz., long haul cargo, public liability and property damage truck insurance. The fact was that the produce company was engaged in extensive buying and selling of produce and poultry and trucking the same between Omaha and California and other western states, and as far east as New York, the business done in California alone amounting to as much as $3,000,000.00 per year.

As early as December 9, 1948, more than six months before the accident out of which this litigation arose, the fact that the produce company had employees operating trucks in California was brought to the attention of American Mutual, when the produce company reported an injury to one of its drivers occurring in California. The claim for that injury was adjusted by American Mutual by payments in accordance with the Nebraska Workmen's Compensation Law, but no steps were taken at that time by American Mutual to provide the produce company with coverage against liability under the Workmen's Compensation Law of California.

About June 15, 1949, a refrigerated trailer belonging to the produce company was abandoned in Los Angeles, California, by the produce company's driver. Arrangements were made via teletype between the produce company and petitioners Carl E. Brown and Paul C. Brown, a co-partnership, hereinafter called Brown Brothers, to have one of three trucks owned by Brown Brothers take the refrigerated trailer to El Centro, California, to pick up a load of melons and bring it to Omaha, Nebraska. The Brown Brothers' truck was driven by respondent Paul C. Brown, who took with him as relief driver one Homer West. The produce company advanced expense money for the trip, and gave detailed instructions for icing the load and for reporting daily by telephone to an Omaha, Nebraska, telephone number. Each day of this trip, either Brown or West called the Omaha number at the appointed time and reported their whereabouts and the condition of the cargo.

Upon arrival in Omaha, Brown and West were told by the produce company's dispatcher where to deliver the melons, and did so. Brown reported defective brakes

on the trailer, and was instructed where to leave the trailer for repairs. That same day, a written lease was made whereby the produce company leased from Brown Brothers the latter's truck for one year. After interviewing Brown and West, and satisfying himself of both the qualifications and the character of the men, Mr. Fulkerson, the produce company's president, hired both Brown and West as truck drivers. Brown and West thereupon filled out and signed withholding tax forms, and so on. The produce company's bookkeeper told Brown that he and West were covered by the produce company's Workmen's Compensation Insurance, and Brown told him that Brown Brothers also had a policy, but that he would have it cancelled, since the produce company's policy covered. Brown received a check for rental on the truck at the rate of 14¢ per mile, and Brown and West each received a pay check at the rate of 3¢ per mile, minus deductions for Federal withholding tax, and social security.

Acting under instructions from the produce company, including detailed instructions to be carried out on the trip, Brown and West left Omaha the following day with a cargo of eggs destined for Portland, Oregon. On June 26, 1949, as they came down the California side of the Donner Pass, the truck and trailer went out of control and the accident occurred in which West was killed and respondent Paul C. Brown was injured.

From the time of their original departure from Los Angeles, both Brown and West acted under the exclusive direction and control of Lipsman-Fulkerson & Co. From the day of their arrival in Omaha, both Brown and West had personal and direct contracts of employment with Lipsman-Fulkerson & Co., to which contracts of employment Brown Brothers were not a party. The

truck Brown and West operated was leased and the trailer was owned by Lipsman-Fulkerson & Co. Brown and West were on the payroll of Lipsman-Fulkerson & Co., and all premiums for compensation insurance based on their earnings were collected by respondent American Mutual Liability Insurance Company, and none were collected by petitioner California Compensation Insurance Company. The latter company's policy of compensation insurance on Brown Brothers was territorially limited to the confines of the State of California. Brown Brothers had no state or interstate permits to operate anywhere outside of the State of California.

For the agreed purpose of simplifying this case by eliminating any complication which might arise out of the fact that Paul C. Brown was also a partner in Brown Brothers, a stipulation was made between all parties and approved by the Commission, as follows:

> "That the relationship and the rights and liabilities, if any, and the defenses, if any, existing at the time and place of the accident herein as between Paul C. Brown on the one hand and the firm of Brown and Brown on the other were identical in all respects with the relationship, if any, and the rights and liabilities and defenses, if any, existing between Homer West on the one hand and Brown and Brown on the other."

It immediately became apparent that the accident of June 26, 1949, would give rise to claims against the produce company for benefits under the Workmen's Compensation law of California.

Mr. Lipsman, secretary of the produce company, was told by the American Mutual's claims representative, that

the omission of coverage against liability under the California Workmen's Compensation law was just an error, and that the produce company was covered.

After this discussion, American Mutual issued a so-called "Universal Endorsement" to the produce company's insurance policy. This Universal Endorsement bore an "Effective Date" of July 28, 1949, and provided that the insurance respecting injuries to which the policy applied was extended to include coverage under the Workmen's Compensation laws of numerous additional states, including California.

After the claim of respondent Brown was filed before the California Industrial Accident Commission, American Mutual informed the produce company by letter that American Mutual would represent the produce company in that proceeding. Thereafter, the referee of the California Commission wrote the produce company, sending copies of his letter to all interested parties, stating that American Mutual had denied insurance coverage. American Mutual's Pacific Coast Claims Manager promptly wrote a letter denying that American Mutual had denied insurance coverage, and stating that American Mutual was defending the case on certain other grounds going to jurisdiction of the Commission, and to the merits of the claim, and reassuring the produce company that American Mutual's attorney would represent any interests of the produce company in the California proceeding. The referee of the Commission then wrote a second letter, emphasizing that he was interested only in an admission

or denial of insurance coverage *under the Workmen's Compensation law of California,* and renewing his inquiry as to whether American Mutual's attorney would represent the produce company. In response to this letter, Mr. Ives, American Mutual's attorney, wrote on February 3, 1950:

> "This is to advise you that I will represent Lipsman-Fulkerson & Company at the time of the next hearing in the above entitled matter and will also represent the American Mutual Liability Insurance Company, their compensation carrier."

However, at the next hearing, which was February 14, 1950, Mr. Ives stated that he was *not* representing the produce company, that he was representing American Mutual only, and denied insurance coverage of the produce company. The produce company had no other representation at that hearing. Nevertheless, the hearing proceeded, and much testimony material to the liability of the produce company was taken.

At the next subsequent hearing, and thereafter, the produce company was represented by Tipton, Weingand & Tipton, who unsuccessfully sought to appear specially to deny jurisdiction of the person of the produce company.

The Industrial Accident Commission held that the American Mutual Liability Insurance Company had no liability under its policy for benefits under the California Workmen's Compensation law, that the aforesaid "Universal Endorsement" did not constitute a voluntary refor-

mation of the policy, that the facts did not warrant judicial reformation of the policy, and that American Mutual was not estopped to deny insurance coverage of the produce company. It further held that Brown Brothers and Lipsman-Fulkerson & Co. were, respectively, the general and the special employers of Paul C. Brown. An award was made in favor of Paul C. Brown against petitioner California Compensation Insurance Company, and respondent Lipsman-Fulkerson & Co., jointly and severally.

Section 11663 of the Insurance Code of California provides as follows:

> "As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments, unless the special employer had the employee on his payroll at the time of injury, in which case the insurer of the special employer is solely liable."

Upon the foregoing facts, your petitioners contended:

I.

Lipsman-Fulkerson & Co. was the sole employer of respondent Paul C. Brown, and your petitioners were no longer the employer of Paul C. Brown at the time of the injury.

II.

If Lipsman-Fulkerson & Co., were insured against liability for the benefits awarded by respondent Commission, Section 11663 of the Insurance Code, *supra*, would

operate to relieve your petitioners of any possible liability, since Paul C. Brown was on the payroll of Lipsman-Fulkerson & Co. at the time of the injury.

III.

The policy of respondent American Mutual Liability Insurance Company, as endorsed after the accident, insured Lipsman-Fulkerson & Co., against liability for the benefits awarded by respondent Commission.

IV.

Any ambiguity in the American Mutual Liability Insurance Company's policy and the "universal endorsement" thereto must be resolved against the said insurance company.

V.

The addition of the "universal endorsement" to the American Mutual Liability Insurance Company's policy constituted a voluntary reformation of the policy.

VI.

If the universal endorsement did not reform the policy, respondent Commission should have done so.

VII.

Respondent American Mutual Liability Insurance Company, by its declarations of coverage after the accident and by its undertaking the defense of respondent Lipsman-Fulkerson & Co., only to abandon the defense in the midst of trial, is estopped to deny insurance of the liability of Lipsman-Fulkerson & Co., herein.

In the Supreme Court of the United States.

MOTION FOR LEAVE TO PROCEED ON CERTIFIED RECORD.

To the Honorable The Supreme Court:

Your petitioners respectfully move the Court for leave to proceed upon the certified copy of the printed record below and without additional copies, and in support of their motion show and state as follows:

That pursuant to the Rules on Appeal in the Supreme Court of California, and in the District Courts of Appeal of said State, twenty-one copies of each of the printed pleadings and briefs constituting the record of said District Court of Appeal were filed with the clerk of said court. That at the time of requesting said clerk to certify said record for presentation to this Court, your petitioners requested said clerk to deliver to petitioners ten copies of said printed parts of said record. That your petitioners were then informed for the first time that promptly after the denial of your petitioners' Petition for Hearing in the Supreme Court of California, it was assumed that no further proceedings would be had in this cause, and all copies of said printed petitions and briefs filed in said District Court of Appeal were destroyed, and only the originals were retained.

That your petitioners are unable at this time to supply printed copies of the record below, other than the certified copy heretofore docketed.

Wherefore, your petitioners pray leave to proceed on the present record pending the granting or denial of certiorari herein.

Respectfully submitted,

MORRIS LAVINE,
MORT L. CLOPTON,
JOHN L. KEARNEY,

Attorneys for Petitioners.

OCT 30 1952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 354

CARL E. BROWN and PAUL C. BROWN, a co-partnership, and CALIFORNIA COMPENSATION INSURANCE COMPANY,

Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, LIPSMAN-FULKERSON & CO., a corporation, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, a corporation, and PAUL C. BROWN,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 354

CARL E. BROWN and PAUL C. BROWN, a co-partnership, and CALIFORNIA COMPENSATION INSURANCE COMPANY,

Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, LIPSMAN-FULKERSON & CO., a corporation, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, a corporation, and PAUL C. BROWN,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the respondent Industrial Accident Commission of the State of California and respectfully submits its brief in opposition to the petition for writ of certiorari filed by petitioners Carl E. Brown and Paul C. Brown, a co-partnership, and California Compensation Insurance Company.

Petitioners seek to review a minute order of an intermediate appellate court of the State of California, which minute order denied said petitioners' petition for writ of review of an award of workmen's compensation benefits made by the Industrial

Accident Commission of the State of California to respondent Paul C. Brown.

JURISDICTION

There is no federal question whatsoever involved in this case. The California appellate courts have interpreted the pertinent provisions of the California law drawn into question by petitioners contrary to that urged by petitioners.

The interpretation placed on the laws of California being within the exclusive province of the State's appellate courts, petitioners' views to the contrary do not give rise to a question cognizable in this honorable court.

STATEMENT OF THE CASE

Petitioners' statement of the procedural facts in the proceedings before the California appellate courts, as set forth at pages 3 through 5 of the petition for writ of certiorari, is substantially correct for a determination of the issue presented.

However, in addition to the petition for writ of review originally filed by petitioners in the district court of appeal, wherein seven alleged grounds of error on the part of respondent Industrial Accident Commission were asserted by petitioners, briefs in answer to petitioners' contentions were filed by the several respondents named therein, including respondent Industrial Accident Commission, wherein the lack of merit in petitioners' contentions was pointed out

(R. 84 through 175). To these briefs in opposition to the petition, petitioners filed a reply brief (R. 176 through 189). Similarly a brief in answer to petitioners' petition for rehearing in the district court of appeal and for hearing in the California Supreme Court was filed on behalf of respondent Industrial Accident Commission (R. 210 through 220, and 255 through 319).

SUMMARY OF ARGUMENT

1. The writ of review is a discretionary writ. Its issuance is dependent on a satisfactory showing being made to the appellate court warranting the exercise of its judicial discretion.
2. The granting or denying of a petition for writ of review does not constitute such a determination of a cause, within the meaning of Article VI, Section 24 of the California Constitution, as to require a written opinion.
3. Section 5952 of the Labor Code of California providing "that the review of a court shall not extend further than to determine certain questions," without providing for a notice and a hearing and oral argument upon such determination, is not, inherently and as construed and applied in this case, unconstitutional and in violation of both the due process clause and the equal protections clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

1. The Writ of Review Is Not One of Right. Its Issuance Is Dependent on a Satisfactory Showing Being Made to the Appellate Court Warranting the Exercise of its Judicial Discretion

Whether the state law makes the issuance of a writ of review a matter of right or rests its issuance in the exercise of a sound judicial discretion by the courts having the authority to issue such writs, is a matter of the construction of the pertinent state law and the procedure under it. The construction of the state law and the procedure under it is exclusively within the province of the appellate courts of the State.

> *Napa Valley Electric Co.* v. *Board of Railroad Commissioners of California,* 251 U. S. 366, 372; 40 S. Ct. 174, 176.

A petition for writ of review of decisions of respondent Industrial Accident Commission, under the provision of Article XX, Section 21 of the California Constitution, and California Labor Code, Sections 5950 through 5955, partake of two phases: First, a determination whether the writ of review should issue, and, second, in the event the writ issues, whether the respondent tribunal exceeded its jurisdiction.

> *Lavore* v. *Ind. Acc. Com.,* 29 Cal. App. 2d 255, 258-59; 84 Pac. 2d 176;
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> *Reilly* v. *Police Court,* 194 Cal. 375, 377-78; 228 Pac. 860;
>
> *Donovan* v. *Board of Police Commrs.,* 32 Cal. App. 392, 396; 163 Pac. 69.

The writ of review, under the California law, is not one of right, but is discretionary with the court upon the showing made in the petition. The writ does not issue as of course, but only where it shows merit on its face.

Lavore v. *Ind. Acc. Com.*, 29 Cal. App. 2d 255, 259; 84 Pac. 2d 176;
Reilly v. *Police Court,* 194 Cal. 375, 377-78; 228 Pac. 860.
Donovan v. *Board of Police Commrs.,* 32 Cal. App. 392, 396; 163 Pac. 69;
Fun. Dir. Assn. v. *Bd. of Fun. Dir.,* 22 Cal. 2d 104, 106; 136 Pac. 2d 785.

The denial of a petition for writ of review, ex parte and without the filing of an opinion by the appellate court, is a determination that upon the facts stated, assuming them to be true, the petitioner is not entitled to the writ prayed for.

Reilly v. *Police Court,* 194 Cal. 375, 377-78; 228 Pac. 860;
Lavore v. *Ind. Acc. Com.,* 29 Cal. App. 2d 255, 259; 84 Pac. 2d 176;
Napa Valley Electric Co. v. *Bd. of Railroad Commissioners of California,* 251 U. S. 366, 372; 40 S. Ct. 174, 176.

It is quite obvious that the 1951 amendment to Section 5952 of the Labor Code of California, which requires the review of decisions of respondent Commission to be "based on the entire record which shall be certified by the commission" is addressed to the

scope of the appellate courts' authority to determine whether the respondent tribunal exceeded its jurisdiction, where the petition for writ of review has been granted.

> "The review by the court shall not be extended further than to determine, based on the entire record which shall be certified by the commission, whether: * * *."
>
> Labor Code, Section 5952

Nothing in the above quoted language purports to legislatively modify the two procedural phases of the petition for writ of review which has been the established practice of the California appellate courts.

That petitioners' evaluation of the 1951 amendment to the California Labor Code, Section 5952, is incorrect is tacitly manifested by the action of the California District Court of Appeal and the California Supreme Court in respectively denying petitioners' petition for rehearing and for hearing in the instant matter, wherein the same argument was urged upon those two courts.

Reilly v. *Police Court,* 194 Cal. 375, 377-78; 228 Pac. 860;

Lavore v. *Ind. Acc. Com.,* 29 Cal. App. 2d 255, 259; 84 Pac. 2d 176;

Napa Valley Electric Co. v. *Bd. of Railroad Commissioners of California,* 251 U. S. 366, 372; 40 S. Ct. 174, 176.

2. The Granting or Denying of a Petition for Writ of Review Does Not Constitute Such a Determination of a Cause Within the Meaning of Article VI, Section 24 of the California Constitution as to Require a Written Opinion

Contrary to petitioners' assertions, a denial, by minute order, of the petition for writ of review, without the rendition of a written opinion by the court, is not in violation of Article VI, Section 24 of the California Constitution. The California Supreme Court has interpreted the constitutional provision as not applicable to the courts' initial action in granting or denying a prerogative writ.

> "Petitioners' first contention may be disposed of by stating that this court has never considered and does not now consider that its initial action in issuing or declining to issue a prerogative writ on ex-parte application, constitutes such a 'determination of (a) cause' (Cal. Const., Art. VI, Sec. 24) as to require a written decision."
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> *Fun. Dir. Assn.* v. *Bd. of Fun. Dir.,* 22 Cal. 2d 104, 106; 136 Pac. 2d 785.

The procedure followed under the California law in disposing of petitions for writs of review, where no good cause is shown to warrant the appellate court's invoking its original jurisdiction, is not in conflict with the due process clause of the Fourteenth Amendment of the Federal Constitution.

> *Napa Valley Electric Co.* v. *Bd. of Railroad Commissioners of California,* 251 U. S. 366, 372; 40 S. Ct. 174, 176.

3. Section 5952, Deering's Labor Code of the State of California Providing "That the Review by a Court Shall Not Extend Further Than to Determine Certain Questions" Without Providing for a Notice and a Hearing and Oral Argument Upon Such Determination Is Not, Inherently and as Construed and Applied in This Case, Unconstitutional and in Violation of Both the Due Process Clause and the Equal Protections Clause of the Fourteenth Amendment to the Constitution of the United States

That respondent Industrial Accident Commission acts as a court exercising judicial functions is firmly established.

Laisne v. *State Bd. of Optometry,* 19 Cal. 2d 831, 836-39; 123 Pac. 2d 457;
Gouanillou v. *Ind. Acc. Com.,* 184 Cal. 418, 420-21; 193 Pac. 937.

It is well established that the due process clause of the federal constitution does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may not claim a right of appeal.

Dohany v. *Rogers,* 281 U. S. 362, 369; 50 S. Ct. 299, 302.

An appellate review of a trial court's determination is not essential to due process of law, but is a matter of grace.

Luckenbach S. S. Co. v. *United States,* 272 U. S. 533, 536; 47 S. Ct. 186, 187.

The procedure for review of the judgments of courts of first instance is wholly within the control of the State Legislature.

Wagner Electric Mfg. Co. v. *Lyndon,* 262 U. S. 226, 232; 43 S. Ct. 589, 591.

The California Legislature, in conformity with Article XX, Section 21 of the California Constitution, prescribed the time honored writ of review (certiorari) as the procedural method whereby decisions of respondent Industrial Accident Commission could be subjected to appellate review. The writ being addressed to the sound discretion of the appellate court, its action in deciding whether to grant or deny the writ, based on the showing made by petitioners, the briefs of respondents in answer thereto, and the brief of petitioners in reply thereto, precludes the existence of any question of a denial of due process for this court to consider.

Petitioners' contention that a notice, hearing and oral argument are necessary concomitants to a disposition of their petition for writ of review of respondent tribunal's decision is not supported by the authorities cited. An examination of those cases discloses that factually the cases were dealing with notice, hearing and oral arguments at the trial court level and as being essential prerequisites to pronouncing judgment against a defendant.

Petitioners' assertion that the procedure provided for appellate review of respondent Industrial Accident Commission decisions violates the equal protections clause of the Fourteenth Amendment is equally untenable. The writ of review is available to all litigants appearing before the trial body who feel aggrieved by its decisions. The fact that petitioners did not make a showing sufficient to convince the appellate court that the trial body exceeded its jurisdiction cannot serve as the basis for a claimed discrimination because others are more successful in convincing the appellate court that such errors occurred in their cases.

It is quite clear that equal opportunity is afforded all aggrieved litigants to invoke the jurisdiction of the appellate court to review the decision of respondent Industrial Accident Commission for alleged excesses of jurisdiction.

CONCLUSION

The California District Court of Appeal's denial of petitioners' petition for writ of review by minute order was in conformity with the pertinent laws of California and their interpretation by the appellate courts of the State. The principles of constitutional law applicable to the proceedings herein objected to clearly establish that no federal constitutional question exists.

For the reasons hereinbefore set forth, it is respectfully urged that the petition for writ of review be denied.

Dated, San Francisco, California.
October 29, 1952.

Respectfully submitted,

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Industrial Accident Commission
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T. GROEZINGER,
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